

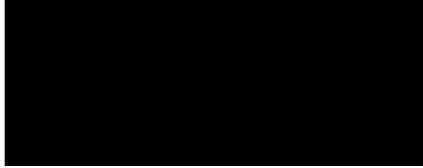


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC-00-195-50226 Office: Vermont Service Center Date: 03 MAY 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:
[Redacted]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a construction engineer at an annual salary of [REDACTED]. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director concluded that the petitioner did not have the ability to pay the beneficiary as of the priority date for the petition since the petitioner's net income in 1996 was less than the difference between the proffered wage and the wage paid to the beneficiary that year.

§ 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is June 24, 1996. The beneficiary's salary as stated on the labor certification is \$43,126 annually.

With the original petition, the petitioner submitted 1999 tax documentation.

On November 13, 2000, the Service requested evidence of the petitioner's ability to pay the proffered wage in 1996 and 1997. In response, the petitioner submitted a Form 1120 U.S. Corporation Income Tax Return for the tax year ending 1996 that contained the following information:

Officers compensation	\$	[REDACTED]
Salaries	\$	[REDACTED]
Depreciation	\$	[REDACTED]
Net income (loss)	\$	[REDACTED]
Current assets	\$	[REDACTED]
Current liabilities	\$	[REDACTED]

The director determined that the net income and depreciation amounted to [REDACTED]. The director then stated that the payment of the proffered wage in that year would have resulted in a net loss for the petitioner and denied the petition.

Counsel argues on appeal that the beneficiary's 1996 salary was already factored into the petitioner's 1996 net income and should not be subtracted again.

In 1996, the petitioner only paid the beneficiary 56 percent of the proffered wage. While not detailing each step in the equation, the director determined that the petitioner did not have the ability to pay the [REDACTED] difference between the beneficiary's salary in 1996 [REDACTED] and the proffered wage [REDACTED]. As the payment of the proffered wage in 1996 would have led to a net loss of [REDACTED] we concur that the petitioner did not have the ability to pay the beneficiary the proffered wage in 1996.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.